Supreme Court of the United States

OCTOBER TERM, 1944.

No. 188.

ALBERT E. McKENZIE, as Trustee in Bankruptcy of GRAVES-QUINN CORPORATION,

Petitioner,

against

IRVING TRUST COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENT.

WILLIAM A. ONDERDONK,
Attorney for Respondent.

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Opinions Below.

The opinion of the Appellate Division is reported in 266 App. Div. 599, and the opinion of the Court of Appeals in 292 N. Y. 347. The opinion of Special Term is not officially reported.

Jurisdiction.

Certiorari was granted October 9, 1944 on a petition filed June 23, 1944. Jurisdiction of the court is invoked under section 237(b) of the Judicial Code, 28 U. S. C. A. 344(b).

Question Presented.

Whether payment of a debt of $150,000 on November 28, 1940, exactly four months prior to the filing of a petition in

bankruptcy against the debtor on March 28, 1941 constituted a transfer within the four months' limitation of section 60a of the Bankruptcy Act when (1) the debt was paid from a payment received by the debtor on November 27, 1940 for work performed by the debtor for the United States pursuant to a subsisting contract; (2) the government payment was mailed to respondent on November 27, 1940; and (3) the government payment was included in moneys assigned to defendant by an instrument of assignment duly executed by the debtor and delivered to respondent on November 22, 1940.

Statutes Involved.

We reproduce here the text of the statutes as far as material:

R. S. 3477, §203, Title 31 U. S. C. A.:

> All transfers and assignments made of any claim upon the United States * * * and all powers of attorney, orders, or other authorities for receiving payment of any such claim * * * shall be absolutely null and void, unless they are freely made * * * after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.

Amendment to Section 3477, Revised Statutes

(October 9, 1940)

(Public, No. 811, 76th Congress.)

(Chapter 779, 3d Session.)

(H. R. 10464.)

An Act.

To assist in the National Defense Program by Amending Sections 3477 and 3737 of the Revised

Statutes to Permit the Assignment of Claims Under Public Contracts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 3477 and 3737 of the Revised Statutes be amended by adding at the end of each such section the following new paragraph:

"The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: PROVIDED,

"1. That in the case of any contract entered into prior to the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned without the consent of the head of the department or agency concerned;

"2. That in the case of any contract entered into after the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;

"3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;

"4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with

"(a) the General Accounting Office,

"(b) the contracting officer or the head of his department or agency,

"(c) the surety or sureties upon the bond or bonds, if any, in connection with such contract, and

"(d) the disbursing officer, if any, designated in such contract to make payment:

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to the Assignment of Claims Act of 1940 shall constitute a valid assignment for all purposes."

Any contract entered into by the War Department or the Navy Department may provide that payments to an assignee of any claim arising under such contract shall not be subject to reduction or set-off, and if it is so provided in such contract, such payments shall not be subject to reduction or set-off for any indebtedness of the assignor to the United States arising independently of such contract.

Sec. 2. This Act may be cited as the "Assignment of Claims Act of 1940."

Approved, October 9, 1940.

Section 1(30) of the Bankruptcy Act:

Meaning of Words and Phrases

Sec. 1.—The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

* * * * * *

(30) "Transfer" shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or

involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise.

Section 60a of the Bankruptcy Act:

Preferred Creditors

Sec. 60a.—A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition in bankruptcy, or of the original petition under chapter X, XI, XII or XIII of this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. For the purposes of subdivisions a and b of this section, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and, if such transfer is not so perfected prior to the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII or XIII of this Act, it shall be deemed to have been made immediately before bankruptcy.

Section 191 Uniform Negotiable Instruments Act:

§191. Definitions

* * * * * *

"Delivery" means transfer of possession, actual or constructive, from one person to another.

Statement.

The Facts.—Graves-Quinn Corporation (hereinafter called Graves-Quinn) was organized under the laws of

the State of New York, with its principal office in New York City (R. 9).

On September 14, 1940 Graves-Quinn entered into a contract with the United States for the construction of military housing in Boston and elsewhere in New England, at a stated consideration of $1,008,800 (Ex. B, R. 9).

The required payment and performance bonds were written by the Standard Accident Insurance Company (R. 48).

Graves-Quinn needed help to finance its operations under the contract (R. 4, 36, 44). It came to respondent, with which it had banked for many years, for the help required (R. 4).

Beginning October 10, 1940 respondent made a series of loans to Graves-Quinn. These continued over several months and until performance of the contract by Graves-Quinn was completed. All notes evidencing the advances bore interest at the rate of 4½% per annum, and all except three were payable on demand (Ex. A, R. 8).

The advances were to be repaid as Graves-Quinn received payments from the government (R. 6). The practice followed the understanding from start to finish. In conformity therewith payment of all three of the time notes was anticipated (R. 7).

As time went on Graves-Quinn sought larger advances than were at first contemplated. Because of the increased loans respondent as early as November 7 asked for an assignment of the moneys to become due from the government as security (R. 44). On November 20 the assignment was executed (Ex. B, R. 9). On November 22 the assignment was delivered to respondent (R. 5, 36, 37).

Because the Graves-Quinn contract was made prior to adoption of the Assignment of Claims Act of 1940, which became law on October 9, 1940, the assignment required the consent of the Secretary of War. This requirement was in-

tended to enable the government, if it wanted, to prevent the contents of outstanding contracts from being divulged (R. 21). The necessary secrecy was controlled in subsequent contracts by the express provision of the Act that an assignment could not be made of any claim arising under a contract forbidding such assignment (R. 41).

Respondent obtained the necessary consent as matter of course on December 5, 1940 (Ex. H, R. 14). The form of the consent shows the indifference of the War Department. The consent was not expressly related to the assignment held by respondent. It was blanket approval of any assignment within the enabling Act.

The Assignment of Claims Act required also that notice of the assignment, together with a copy of the instrument of assignment, be filed with each of several government departments and with the surety on the bonds which the assignor had posted (R. 42). Respondent fully complied with this requirement.

The Quartermaster General was notified of the assignment and furnished a copy of the assignment on November 27 (Ex. F, R. 12). A copy of the assignment with notice was mailed to the surety on December 2 (Ex. G, R. 13). On December 2 also, copies of the assignment with notices similar to that to the surety were mailed to the General Accounting Office and to the Disbursing Officer (R. 5).

By reason of the assignment the government made all payments to which Graves-Quinn became entitled under the contract throughout December 1940 and January 1941 direct to respondent (R. 7). In March, at the request of Graves-Quinn (Ex. D, R. 11), the assignment was released (Ex. E, R. 12).

After the making of the assignment but before the filing and consent the government issued and delivered to Graves-Quinn in Boston, on account of its liability on the

contract, its check for $155,865.50. This check was received by Graves-Quinn on November 27 (R. 5). On the same day Graves-Quinn mailed the check to respondent. The check was physically received by respondent in New York on November 28 (R. 5, 6).

On November 27 also, Graves-Quinn drew its check to the order of respondent for $150,000 (R. 6, Ex. K, R. 16), which was likewise physically received by respondent in New York on November 28 (R. 6).

At the opening of business on November 28, 1940 respondent had on its books three notes made by Graves-Quinn, two payable on demand aggregating $60,000, and one note for $50,000 due by its terms on December 9, 1940. At the same time Graves-Quinn was indebted to respondent by reason of overdrafts upon its checking account aggregating a little more than $40,000 (R. 4; Bank Statement, R. 40). During the course of the day, November 28, the government check was credited to the Graves-Quinn account, a demand note dated November 20 for $40,000 went on the books, virtually wiping out the overdraft, the $150,000 check drawn by Graves-Quinn was debited to its account and the four notes aggregating $150,000 were retired (Bank Statement, R. 40; Ex. A, R. 8). It is the payment of the debt of $150,000, represented by the four notes (Exhibits submitted by petitioner on argument R. 51), of which petitioner complains.

Payment of the debt in its entirety came from the government payment of $155,865.50 (R. 6).

November 28 was exactly four months before the filing of the bankruptcy petition (R. 22).

After the events of November 28, business went on as before for many weeks. On the very next day respondent made a fresh advance of $82,000 (Ex. A, R. 8).

Respondent had some doubt as to the worth of the assignment as security (R. 33). In particular it did not know but that its value might be impaired during the subsequent life of the contract by action on the part of the surety. The situation was clarified when the surety wrote its letter of December 6, 1940 (R. 37, 38).

The surety, by reason of the performance and payment bonds which it had furnished, was committed before the bank made the initial loan on October 10. It had underwritten completion of the job and payment of its labor and material costs. It was obligated to see the project through, whether Graves-Quinn stood or fell. The surety wanted Graves-Quinn to finish the job. In its own interest it wrote the letter of December 6.

While Graves-Quinn carried its contract to completion it was unable to pay all the bills. The surety had to pay those materialmen who remained unpaid after completion of the contract.

It was the surety that on March 28, 1941 caused a petition in bankruptcy to be filed against Graves-Quinn (R. 21, 43).

It is not disputed that the only purpose of the bankruptcy proceeding was to make possible the pending suit against respondent. In preparation therefor the receiver appointed by the court was replaced by the trustee selected by the surety. The attorneys for the surety became attorneys for the trustee (R. 43).

The Motion.—The motion is addressed to the first of two causes of action. In this cause of action petitioner seeks to recover the payment of $150,000 to respondent as preferential by section 60a of the Bankruptcy Act.

The pleadings raise several issues. The motion of respondent involves only one issue.

That issue is whether the transfer, which petitioner must avoid if he is to recover on the first count, did or did not occur within four months of the filing of the bankruptcy petition as required by section 60a of the Bankruptcy Act to make it preferential. Respondent singled out and urged as the ground of its motion that the transfer did not occur within the four months' period (R. 7, 20).

Stated another way, the question raised by the motion is whether the payment on November 28 or the events of a prior date constituted the transfer. Petitioner's answer is that payment of the debt was made on November 28 and that fact alone settles the issue. Respondent's answer is that while the debt was paid on November 28, underlying the payment was an antecedent transfer which is controlling.

The facts by which the time of the transfer must be determined are too well attested to be disputed. They are not disputed.

The Opposition.—In the first of two affidavits in opposition petitioner assailed the good faith of respondent. The charge was both irrelevant and untrue. When the Appellate Division observed that respondent acted in good faith in taking the assignment (R. 66) it only reflected the record.

In a second affidavit in opposition petitioner asserted a prior right in the surety to the government payment of $155,865.50 out of which the Graves-Quinn notes held by respondent were paid. This claim was predicated on an agreement made by Graves-Quinn on October 2, 1940 (Ex. A, R. 50) and long before the assignment to respondent. It has no place in this action for various reasons. One sufficient reason was stated by Judge Lehman thus:

"* * * the action is not brought by the plaintiff as trustee to establish that the surety has a title superior to the title of the bank. The action is brought solely to set aside the transfer to the bank as an unlawful preference. The trustee in bankruptcy has no authority to bring an action to establish a superior title in some other person" (R. 105, 106).

Both opposing affidavits were made by a total stranger to the events of November 1940, and what is stated in support of the surety is unsupported hearsay with the exception of the agreement of October 2 between the surety and Graves-Quinn.

The real significance of petitioner's plea in behalf of the surety is the disclosure that as far back as the time when the record was being made petitioner lost confidence in his cause of action. The alleged liability of respondent to the surety was offered as a substitute for a transfer within four months of the filing of the petition. The alternative was counted on in one devious way or another to block dismissal of the trustee's suit.

One of petitioner's major grievances in this court is that the stratégem of the surety did not work in the state courts.

SUMMARY OF ARGUMENT.

POINT I.—Respondent had an assignment of all moneys due and to become due from the government to Graves-Quinn under War Department Contract #6101 qm-131 that was perfected by the test of section 60a of the Bankruptcy Act on November 22, 1940.

The provisions of the Assignment of Claims Act of 1940 for filing and consent do not give a second assignee a

superior right by reason of being the first to obtain the statutory consent or to file. Relative rights must be determined by principles of general application and by state law.

By the law of the State of New York as between successive assignees the first assignee has priority regardless of delay in giving notice to the debtor.

POINT II.—By reason of the assignment respondent had at least a property interest in the government payment of $155,865.50 out of which the $150,000 debt of Graves-Quinn was discharged that was superior to any right that any purchaser from or creditor of Graves-Quinn might acquire within four months of the filing of the petition.

Apart from the Assignment of Claims Act of 1940 respondent had a lien on the government check in the hands of Graves-Quinn.

When Graves-Quinn endorsed and delivered the check to respondent, if not before, the transfer was perfected by the test of section 60a. As this occurred outside the four months' period it is as effective against petitioner as against Graves-Quinn.

POINT III.—As payment of the debt on November 28, 1940, was made from security, the time of the transfer was the time when the security position was perfected on or before November 27, 1940.

The rule respecting choses in action as security does not differ from the rule respecting security in other forms. It is the time when the security position is perfected, and not the time when the avails thereof are received and applied in payment of the debt that controls.

POINT IV.—The mailing of the government check for $155,865.50 to respondent on November 27, 1940, was a delivery on that day and against this check, treated as a routine deposit, respondent had a right of setoff which is beyond the reach of petitioner.

Wholly apart from the assignment, respondent had a right to the government payment by way of setoff.

Treating the transfer of the check to respondent as a deposit merely; the transfer occurred as matter of law on November 27.

The fact that the check of the debtor for the amount of the debt was charged to the account of the debtor did not affect the right of setoff.

POINT I.

Respondent had an assignment of all moneys due and to become due from the government to Graves-Quinn under War Department Contract #6101 qm-131 that was perfected by the tests of section 60a of the Bankruptcy Act on November 22, 1940.

The question under this head is whether the assignment was effective as a transfer as of the execution and delivery of the instrument of assignment (outside the four months' period) or was effective only as of the consent and filing (within the four months' period). By effective, we mean an assignment that meets the requirements of section 60a. That means an assignment so perfected that no purchaser from the assignor and no creditor could thereafter acquire any right in the property transferred superior to that of respondent. It does not mean that the assignment was

enforcible against the obligor before the statutory conditions were fulfilled.

To answer the question raised it is necessary to determine what respondent had in the instrument of assignment on November 22 and what it did not have. By that means we can find out whether respondent had sufficient to satisfy the necessities of section 60a or, as petitioner maintains, pending consent and filing the assignment was a nullity.

As good a way as we know by which to evaluate the assignment when the instrument of assignment was delivered on November 22 and thus answer the main question is to ask and answer three lesser questions as of that date. 1. Was the assignment operative as between assignor and assignee? 2. Was the assignment operative as against a subsequent assignee? 3. Was the assignment operative as against the government?

(1) The assignment was binding on the assignor from the time of the delivery of the instrument of assignment on November 22.

Consent after the event is closely analogous to ratification by a principal of a prior unauthorized act of his agent. In 15 C. J. S. 980, it is said of the word "consent" that "it may be by ratification as well as by previous permission."

In *Pickering* v. *Lomax*, 145 U. S. 310, a deed was executed and delivered by an Indian landowner which by law required the consent of the President of the United States. The consent came thirteen years later. This court held that the deed was just as effective as if the consent had preceded its execution and delivery.

> "So far as the main question is concerned, we know of no reason why the analogy of the law of principal and agent is not applicable here; viz., that an act in excess of an agent's authority, when per-

formed, becomes binding upon the principal, if subsequently ratified by him. The Treaty does not provide how or when the permission of the President shall be obtained, and there is certainly nothing which requires that it shall be given before the deed is delivered. * * * A delay of thirteen years is immaterial, provided, of course, that no third parties have in the meantime legally acquired an interest in the lands.

* * * * * * *

"Nor do we consider it material that the grantee had in the meantime died, since if the ratification be retroactive, it is as if it were indorsed upon the deed when given, and enures to the benefit of the grantee of Horton, the original grantee—not as a new title acquired by a warrantor subsequent to his deed enures to the benefit of the grantee, but as a deed imperfect when executed, may be made perfect as of the date when it was delivered."

The Assignment of Claims Act does not require that the consent precede the assignment. The government did not consider the time of the consent material. It honored the assignment without question despite the fact that the consent came not only after the assignment but after the filing.

Petitioner at one time saw an obstacle to giving retroactive effect to the consent in that the consent contains the words "all money due or to become due * * * and not already paid." These words are patently superfluous, as an obligor is not liable for making payment to an assignor before it has knowledge of an assignment even when the assignment is perfected at the time of such payment.

The one concern of the War Department was whether the assignment should or should not be approved, not the time when the assignment should be effective. Because

the department expressly disclaimed a responsibility to the assignee which did not exist anyway is not a reason for losing sight of the limited purpose of the statutory consent.

The Act sets no limit on the time of the required filing. No provision is made for the docketing or indexing of assignments filed. No disability is suggested by reason of delay in filing. No penalty is suggested for failure to file.

As a guide to the construction of the Assignment of Claims Act we can do no better than point to the decision of the New York Court of Appeals in *Amiesite Constr. Corp.* v. *Luciano Contr. Co.*, 284 N. Y. 223. The case involved the State Lien Law, notably section 16. This section, dealing with the assignment of contracts for public improvements or of the money payable thereunder, provides that no such assignment "shall be valid unless * * * filed within twenty days after the date of such assignment of contract, or such assignment of money * * *." The assignment was under attack by a creditor of the assignor due to the failure of the assignee to comply with the statute. The court upheld the assignment even as against a creditor of the assignor.

> "No attack has been directed against the assignment except on the specific grounds that it was void as against appellant because (1) it was not filed as required by section 16 of the Lien Law, and (2) it did not contain the covenant required by section 25 (subd. 5). In spite of the failure of Fiore to file his assignment and the omission of the clause required by section 25 (subd. 5) of the Lien Law it was, however, not void under the circumstances of this case."

The New York Lien Law puts a limit on the time to file and makes validity contingent upon filing. The Assign-

ment of Claims Act fixes no time limit and does not make validity contingent upon filing.

There is nothing in the statute itself to encourage the notion that the assignment was wholly inoperative pending compliance with the routine requirements of the Act. And petitioner's contention that the assignment is to be given effect only as if executed and delivered at the time when all statutory requirements were met is wholly unsupported.

Clearly, the assignment bound Graves-Quinn as well before December 5 as after. On Graves-Quinn at least it was binding from November 22.

(2) From the delivery of the assignment on November 22 no purchaser from Graves-Quinn and no creditor could acquire a superior right to the moneys assigned.

At no time was there any person in being to dispute the right of respondent under the assignment. During December 1940 and January 1941 respondent, pursuant to the assignment received direct from the government the payments due to Graves-Quinn under the contract (R. 7). But as a trustee in bankruptcy is invested by section 60a of the Bankruptcy Act with the powers, if any, of certain specified classes of persons, it is necessary here that respondent's right as assignee be measured against the rights of creditors of, or potential purchasers from Graves-Quinn.

With the adoption of the Chandler Act in 1938 a new formula was introduced for fixing the time of transfers for the purpose of knowing whether they fall within or without the four months' period. For such purpose a transfer is deemed to be made as of the time when so far perfected that no bona fide purchaser from the debtor and no creditor can *thereafter* acquire a superior right. The avowed aim of the amendment was to more effectively strike at secret liens closely preceding bankruptcy.

The aim is not to be confused with the means. Secrecy is not the test.

Nor is it to be assumed that section 60a has any more to do now than formerly with any rule governing the completion of a transfer to the point where no creditor or purchaser can acquire a superior right. Congress has not in the Bankruptcy Act undertaken to exercise jurisdiction in that area. It still belongs to the domain of state law.

What Congress obviously had in mind was to bring within range of the trustee in bankruptcy, if not fully consummated pursuant to state law more than four months before the filing of the petition: (1) transfers subject to recording acts pursuant to which failure to record a conveyance is at the risk that it may be void as against a subsequent purchaser; and (2) pledges of chattels which require change of possession of the pledge if the pledgee is to be protected against a subsequent assignee. The purpose of Congress has been substantially achieved.

In *Carey* v. *Donohue*, 240 U. S. 430, a deed to real property in Ohio was delivered outside four months and recorded within four months of the bankruptcy of the grantor. This court in construing section 60a as it then read held that the four months' period must be computed from the earlier date, thereby making the transfer secure against attack as preferential. Today, on the same facts, the court would compute the four months' period from the recording date and hold the transfer preferential.

The change in section 60a has made no change in the law of Ohio, whereby failure to record makes a deed invalid as to subsequent bona fide purchasers without notice. The hazard of a second sale which is assumed by the grantee who fails to record his deed existed before 1938. It is this possible defect in the grantee's title so long as the recording

is delayed that permits the trustee under the present section 60a to have the benefit of the recording date as the starting point of the four months' period.

Goldstein v. *Rusch*, 56 F. (2d) 10, involved a pledge of tangible property as security. While the pledge was made outside the four months' period, the chattels came into the pledgee's possession within that period. The court held under the former section 60a that the four months' period must be computed from the time of the pledge, regardless of the time the chattels changed hands. Today the court would hold the same transfer preferential because the four months' period must be computed from the time possession is transferred.

The change in section 60a has made no change in the law, whereby the right of a pledgee is defeasible so long as the chattel is withheld. The risk of a second pledge, which the pledgee of a chattel runs who fails to reduce it to possession, was as real before 1938 as after. It is this defect in the uncompleted pledge that permits the trustee under the present section 60a to have the benefit of the date when possession is transferred as the starting point of the four months' period.

The new section 60a neither expressly nor by implication outlaws the doctrine of relation back. What it does is to utilize a limitation on the doctrine that is as old as the doctrine itself.

Every case in which a transfer not preferential before 1938 is preferential now is accounted for by a latent infirmity under applicable law of which the trustee is empowered by the 1938 amendment to take advantage. If there was no such infirmity before 1938 there is none now.

Referring to the present section 60a, this court wrote in *Corn Exchange National Bank* v. *Klauder*, 318 U. S. 434:

"Its apparent command is to test the effectiveness of the transfer, as against the trustee, by the standards which applicable state law would enforce against a good-faith purchaser."

While the rule is quite general that the pledge of a chattel is perfected only by change of possession of the chattel, there are two rules on the perfection of the assignment of a chose in action.

"The English rule is that he will have preference who first gives notice to the debtor, even if he be a subsequent assignee, providing at the time of taking it he had no notice of the prior assignment."

"The reason for the rule is that in the case of a chose in action the assignee must do everything toward having possession of which the subject admits; he must do that which is tantamount to obtaining possession by placing every person who has an equitable or legal interest in the matter under obligation to treat it as his property. For this purpose he must give legal notice to the holder of the fund; in the case of a debt notice to the debtor is tantamount to possession. If he omits to give notice, he is guilty of the same degree and species of neglect as one who leaves a personal chattel to which he has acquired title in the actual possession and under the absolute control of another. * * *

"The American rule, as it has been called, is that the assignee that is prior in time is prior in right; that the same rules apply to the sale of a chose in action as in other sales of personal property, and if the seller has sold the thing to one person, and, therefore, has no title to pass to a second, the latter takes nothing by his purchase. This rule has been adopted by at least fourteen states."

Hanna v. Lichtenhein, 182 App. Div. 94, 97.

The so-called American rule prevails in New York and numerous other states.

"In Muir *v.* Schenck (3 Hill. 228), it was held that as between different assignees of a chose in action by express assignment from the same person, the one prior in point of time will be protected, though he have given no notice to either the subsequent assignees or the debtor, and the question between a previous assignee and a subsequent attaching creditor was considered the same in principle as that between conflicting assignees. However much that case may have been criticized elsewhere it has been considered well decided in this state."

Williams v. *Ingersoll*, 89 N. Y. 508, 523.

"It is further the settled law of this state, • • • that a bona fide purchaser for value of a chose in action takes it subject not only to the equities between the parties, but also to latent equities in favor of third persons, and that to secure his superiority it is not necessary that the earlier assignee should give any notice of his assignment to the debtor or trustee."

Central Trust Co. v. *West India Imp. Co.*, 169 N. Y. 314.

The plaintiff in *Goodyear Tire & Rubber Co.* v. *Bagg, et al.*, 292 Mass. 125, had been previously sued by one Flower for breach of contract and in that action Flower recovered a judgment for $129,412.50. In the meantime Flower had assigned his interest in the contract to a succession of persons as security for debts owing.

As the debts so secured exceeded the amount of the judgment, an agreement was entered into between Goodyear, Flower and several assignees holding written assignments whereby an agreed sum was paid by Goodyear to each of these assignees regardless of priority of right.

Outstanding at the time was an assignment to one Stoneman for legal services in the earlier action. His right to share in Flower's judgment was disputed and he was not

a party to the distribution agreement. By reason of Stoneman's claim, however, the agreement provided that Goodyear retain a balance of $11,200, bring a bill of interpleader against the various assignees, including Stoneman, for the purpose of testing Stoneman's right to enforce his claim against the undistributed balance, and that so much of the sum as was not awarded to Stoneman should be distributed ratably among the parties to the agreement.

The bill of interpleader was brought and the balance paid into court. In the course of this suit one Rudnick for the first time appeared and asserted that he had lent $1,000 to Flower "on the security of an informal oral assignment" of the Flower claim against Goodyear.

> "The trial judge found and ruled 'that an assignment enforceable in equity was made by Flower to Rudnick of a sufficient portion of his Goodyear claim to secure repayment to Rudnick of his loan to Flower,' that this assignment was next in point of time after Stoneman's assignment and that it 'is valid and effectual to entitle . . . [Rudnick] to be paid $1,044.26 out of the fund in court,' after payment of a sum which he found to be due to Stoneman."

In affirming the decree in favor of Rudnick, the appellate court wrote:

> "The appellants further contend that the agreement of 1933 defeated Rudnick's claim under his assignment, although he was not a party to it and no provision was made for him in it. This contention cannot prevail. Rudnick's assignment was prior in time to those held by the appellants who were parties to the agreement. His lien upon the sums due under the contract between Albert Flower and the plaintiff was therefore senior to theirs. This is true even if he gave no notice of his assignment to the

plaintiff (Thayer *v.* Daniels, 113 Mass. 129; Putnam *v.* Story, 132 Mass. 205, 211; Rabinowitz *v.* People's National Bank, 235 Mass. 102; Cosmopolitan Trust Co. *v.* Leonard Watch Co., 249 Mass. 14, 19) and although his assignment was what is sometimes called an 'equitable' assignment, for the law governing all assignments of choses in action of the kind here involved had its origin in equity, and priorities among them are determined without regard to any distinction between legal and equitable titles. Fairbanks *v.* Sargent, 104 N. Y. 108. Lexington Brewing Co. *v.* Hamon, 155 Ky. 711, 715. Williston on Contracts, §§435, 438, 446a, 447. See Bridge *v.* Connecticut Mutual Life Ins. Co., 152 Mass. 343. Rudnick might lose his rights through a payment by the plaintiff to later assignees before notice of Rudnick's claim (Rabinowitz *v.* People's National Bank, 235 Mass. 102) or by reason of 'a novation with the obligor, whereby the obligation in favor of the assignor is superseded by a new one running to' the later assignees, which is treated as equivalent to payment. Williston on Contracts, §435. Salem Trust Co. *v.* Manufacturers' Finance Co., 264 U. S. 182, 199 (note). But there has been no full payment which obliterates the original obligation of the plaintiff."

What the court called the American rule in the *Hanna* case was the rule of the federal courts after, if not before, *Salem Trust Co.* v. *Manufacturers' Finance Co.*, 264 U. S. 182, and until the decision in *Erie RR. Co.* v. *Tompkins*, 304 U. S. 62, by which independent general law in the federal courts was abandoned in favor of applicable state law.

"There is no decision of this court which sustains the contention that, as between successive assignees of the same chose in action, mere priority of notice gives priority of right. It seems to us that the better reasons are against such a rule. By the first assignment, the rights of the assignor pass to

the assignee. The creditor has a right to dispose of his own property as he chooses, and to require the debt to be paid as he directs, without the assent of the debtor. * * * Notice of the assignment to the debtor adds nothing to the right or title transferred. A subsequent assignee takes nothing by his assignment, because the assignor has nothing to give. * * * If, after assignment, the assignor receives payment from the debtor, he is liable to the assignee. Failure of the first assignee to give notice does not divest him of any title or right, or vest any claim in a subsequent purchaser. It cannot injuriously affect an intending purchaser who makes no inquiry of the debtor concerning the assignor's title. The debtor is not bound to answer inquiries concerning the assignor's title, and there can be no assurance that an intending purchaser can ascertain the encumbrance by inquiry of the debtor having notice of the earlier assignment. * * * It is impossible to eliminate all risk from such a transaction. If the second assignee elects to rely on the representations of the vendor as to his title, and is deceived, he cannot shift his loss to the first assignee, unless some act or omission of the latter was proximate to the deception."

Salem Trust Co. v. *Manufacturers' Finance Co.*, 264 U. S. 182.

Corn Exchange National Bank v. *Klauder*, *supra*, of which petitioner makes much, but the significance of which he misses, involved a transaction in Pennsylvania, whose law at the time required notice to the debtor to perfect the assignment of an account. The assignment fell before the attack of the trustee not because the Supreme Court repudiated the doctrine of relation back as plaintiff says (Point III) but because by the law of Pennsylvania until the assignee gave notice to the debtor the way was wide open to a subsequent assignee to acquire a prior right.

In the recent case of *Rockmore* v. *Lehman*, 129 F. (2d) 892 (cert. den. January 18, 1943, 317 U. S. 700) plaintiff, as trustee in bankruptcy, sued to recover funds deposited in court to which assignees of the bankrupt also made claim. In the Circuit Court the trustee prevailed at first (128 F. (2d) 564), but upon reargument the court repudiated its first decision and affirmed the judgment in favor of the assignees (129 F. (2d) 892).

The assignments, as the first opinion shows, were of moneys to become due to the bankrupt in the course of performance of contracts which it had with Calvert Distillers Corporation. One of the assignments said by the court to be typical of the others appears *in extenso* in the earlier opinion. We emphasize this fact in anticipation that petitioner will use again, as he has before, an ambiguous sentence in the second opinion of Judge Hand in an attempt to distort the holding.

The *Rockmore* decision turned on the law of New York just as certainly as the *Klauder* case turned on the law of Pennsylvania.

> "We cannot agree with appellant's contention that Section 60, sub. a, of the present Bankruptcy Act, 11 U. S. C. A. §96, sub. a, affects our decision, and that there would be an unlawful preference as to any sums paid or payable after knowledge of insolvency. On the contrary we hold that the date of the assignments governed the imposition of the liens on any sums due from Calvert. * * * It has long been the New York law that such an assignment is good against a bona fide purchaser, even though the bona fide purchaser is the first to give notice to the obligor. * * * The same thing is true of an execution creditor or a trustee in bankruptcy."

It is not an occasion for regret that the assignments in the *Rockmore* case by reason of the New York rule were

outside the reach of section 60a. The result there is to be preferred to that in the *Klauder* case which, as this court tells us in footnote 6, was quickly followed by curative legislation in Pennsylvania.

It is patent error to assume that because the changes in section 60a were aimed at secret liens secrecy precludes perfection of a transfer. It is only by indirection that the purpose of the amendment is furthered. It was not section 60a or this court, as petitioner asserts (brief, p. 15) that condemned secrecy if it was condemned in the *Klauder* case. It was the law of Pennsylvania. In the *Rockmore* case the transfer was perfected in secrecy. Because New York is a non-notification state, the court upheld the transfer.

Writing in the Columbia Law Review for January, 1943, on "Some Unsolved Problems under Section 60a of the Bankruptcy Law," Professor Hanna said (p. 69):

> "Most talk of secret liens seems to belong to a dream world. To overlook the fact that book accounts are not displayed in windows nor on store shelves, where in contemporary existence is credit extended on the basis of visible possessions?
>
> * * * * * *
>
> Where an assignment of receivables can be defeated neither by a creditor nor a bona fide purchaser, section 60a does not change the former law. This conclusion is supported by the Second Circuit in the recent case of Rockmore *v.* Lehman."

In this country the doctrine that possession denotes ownership has not been extended to choses in action.

> "The rule of the English statutes as to reputed ownership may extend to debts growing due to the bankrupt in the course of his business, but we have no such statute."
>
> *Grecy* v. *Dockendorff*, 231 U. S. 513.

"In general, the doctrine of reputed ownership, which in England extends to traders' debts (21 Jac. 1, c. 19; Ryall *v.* Rowles, 1 Ves. Sr. 348), does not in the United States include any kind of choses in action (Greey *v.* Dockendorff, 231 U. S. 513, 34 Sup. Ct. 166, 58 L. ed. 339; Clark *v.* Iselin, 21 Wall. 360, 369, 22 L. Ed. 568; Sexton *v.* Kessler, 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995; Stackhouse *v.* Holden, 66 App. Div. 423, 73 N. Y. Supp. 203).

* * * * * *

"The origin of the doctrine rested upon the putative credit which the possessor was enabled to enjoy by the display of the goods. Lord Hardwicke, in Ryall *v.* Rowles, *supra,* extended this to traders' debts; but it has gone no further in England, even under the Bankruptcy Act (46-47 Viet. c. 52, §44), and it is at least questionable whether, in the absence of some specific deception, traders' debts are a source of putative credit. However that may be, the rule based upon the possessor's power of disposal in New York arose as an application of the doctrine of reputed ownership of a stock of goods, and should be as much so confined as that doctrine in its other applications."

In re Michigan Furniture Co., 249 Fed. 978.

This court in *Benedict* v. *Ratner,* 268 U. S. 353, again recognized our departure from the English rule.

"The doctrine which imputes fraud where full dominion is reserved must apply to assignments of accounts although the doctrine of ostensible ownership does not."

We know why the statute required the consent of the Secretary of War to the assignment of moneys payable under contracts outstanding on October 9, 1940. It was in

no way related to the interests of creditors of or purchasers from Graves-Quinn.

Whatever the purpose of the filing requirements of the Act, it was not that the general public should have notice. The facts respecting assignments on file are not public property.

Whatever the purpose of the statutory requirement that the surety be notified of the assignment, it was not that the surety might veto it. The hearings on the bill disclose that the surety companies were opposed to it. They sought but were denied veto powers. They wanted to be included among the authorized assignees. This was denied (see hearings before the Judiciary Committee of the House August 28, 1940 on H. R. 10365 and H. R. 10403, to amend section 3477 of the Revised Statutes, p. 44). What they obtained was the provision for notice. To a surety the value of the notice consists of the use it can make of the information received. It is a strictly limited use.

The surety here had no more control over the assignment than any creditor or potential purchaser. It could not, in the words of section 60a "thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein." If, as it claims, it had a higher right, that right was acquired before the assignment to the bank and not "thereafter."

The purpose of the Assignment of Claims Act is best served if lending institutions can rely on it. If an assignment is not effective until the several notices and copies of the instrument are filed, then financing institutions have no security at the time the assignment is executed and delivered. They must wait for the routine details to be completed. In the meantime, they must withhold advances. Otherwise, by *Corn Exchange National Bank* v. *Klauder*, *supra*, "the debt, which is effective when actually made,

will be made antecedent to the delayed effective date of the transfer and therefore [the transfer] will be made a preferential transfer in law, although in fact made concurrently with the advance of money."

(3) The delay in obtaining the consent and in the filing had the effect only of impairing the recourse of respondent to the government.

Again, for our guidance in construing the Assignment of Claims Act, we refer to another decision of the New York Court of Appeals. *Fortunato* v. *Patten*, 147 N. Y. 277, involved a contract to which the City of New York was a party. One of the provisions of the contract is described thus (p. 280):

> "It is provided by the contract in substance that the contractor shall not assign the contract, or any of the moneys payable thereunder, without the consent of the city, signified in writing by the Commissioner of Public Works endorsed on the agreement; that in the absence of such consent no right under the contract, nor to any moneys to grow due by its terms, should be asserted against the City of New York."

Several assignments were made, the first of which did not have the required consent. In reversing General Term the Court of Appeals held that the first assignee, without the consent, was entitled to priority over a subsequent assignee, with the consent.

> "The provision of the contract adverted to has been treated by the court below as rendering void all assignments of moneys to grow due unless the consent of the City was obtained and as available by any assignee to defeat the rights of a senior assignee who had failed to secure the necessary consent.
>
> "We do not think that this provision is capable of any such construction; it was inserted in the

contract solely for the benefit of the City, and prevents any claim being asserted against it in the absence of consent; it is a shield to protect the City, and not a weapon with which a junior assignee is to fight his way to a more favorable position in the line of payment."

Of course, in the absence of the consent of the War Department and the filing, the government made the payment of November 27 to Graves-Quinn. If respondent was willing to assume the risk, it was free to permit the assignor to receive the assigned moneys without losing the benefit of the assignment.

"The necessity for notice by an assignee to the debtor arises where he seeks to protect himself against a payment by the debtor to the original creditor. The debtor is released from liability to the assignee unless he has been notified of the assignment. * * * It is fully established by authority that complainant could legally authorize the company as agent for him to collect the assigned claims and accounts."

Young v. *Upson*, 115 Fed. 192.

"It was not needful to make the assignment or lien valid and effectual against Heath and against his attaching creditors, that notice thereof should have been given to the debtors, the Ingersolls. Such notice was needful only to defeat a subsequent bona fide payment by the Ingersolls."

Williams v. *Ingersoll*, 89 N. Y. 508, 522.

"If a debtor pays, or becomes bound to pay, a later assignee, he is not liable to an earlier assignee who failed to give him notice of his assignment. And if, without notice of any assignment, he pays the assignor, he cannot be held by the assignee. To safeguard against such things, it is necessary for an

assignee to give the debtor notice of his assignment. But it does not follow that mere priority of notice of the later assignee, who took nothing by his assignment will subordinate the rights of an earlier assignee."

Salem Trust Co. v. *Manufacturers' Finance Co.*, 264 U. S. 182.

It is only when the assignor has free use of the proceeds that collection of an account by him prejudices the assignment.

"Thus, although an agreement that the assignor of accounts shall collect them and pay the proceeds to the assignee will not invalidate the assignment which it accompanies, the assignment must be deemed fraudulent in law if it is agreed that the assignor may use the proceeds as he sees fit."

Benedict v. *Ratner*, 268 U. S. 353.

If payment by the debtor direct to the assignee were necessary to the validity of an assignment, notice to the debtor would no doubt determine the time when the assignment is perfected. In such event the filing requirements of the Assignment of Claims Act might define what constitutes due notice. As payment to the assignee is not essential to the validity of the assignment, the filing requirements serve only to define the notice to which the government is entitled if it is to make payment to the assignee rather than to the assignor.

When the Appellate Division in its decision (266 App. Div. 599) limited the effect of the delay to the risk to the assignee in permitting the assignor to collect the moneys assigned as agent, it gave the delay all the significance that it merits. That decision draws strength from sources deep in our concept of private property.

An inherent attribute of private ownership is the right of free disposal. Our law is partial to freedom of alienation. So true is this that it is difficult even to contract away the right to assign a chose in action.

> "Of course, a covenantor is not to be held beyond his undertaking, and he may make that as narrow as he likes. * * * But when he has incurred a debt, which is property in the hands of the creditor, it is a different thing to say that, as between the creditor and a third person, the debtor can restrain his alienation of that, although he could not forbid the sale or pledge of other chattels. When a man sells a horse, what he does, from the point of view of the law, is to transfer a right, and a right being regarded by the law as a thing, even though a *res incorporalis*, it is not illogical to apply the same rule to a debt, that would be applied to a horse. It is not illogical to say that the debt is as liable to sale as it is to the acquisition of a lien."

Portuguese-American Bank v. *Welles*, 242 U. S. 7.

Statutes which have the effect of limiting free alienation are tightly construed. So true is this that the original statute to which the Assignment of Claims Act of 1940 was added is not as forbidding as its language suggests.

In *Martin* v. *National Surety Co.*, 300 U. S. 588, an assignment was upheld which, tested by the statute, was "absolutely null and void." This court looked below the surface for the purpose of the ban on assignments of claims against the government. It found anew that the purpose was government protection. With that purpose served the government was found to be indifferent to assignments by its creditors. Thereupon this court excluded from the ban an assignment needlessly caught in the language of the law. That was discrimination responsive to a sound instinct in favor of the right of alienation.

Because the assignor is in bankruptcy is not a reason for enlarging the purposes for which the consent and filing are required. To do this in the name of section 60a of the Bankruptcy Act would be to arbitrarily add to section 60a an authority to which it has no claim. That section has no answer to the question how a creditor or purchaser can acquire priority over an earlier assignee. It has no standard of its own by which to determine the rights of successive assignees. To know that, it is necessary as we have seen to look to other law. And the meaning of that other law is not to be distorted by reference to section 60a. As surely as section 60a defines perfection of transfer as the time when no creditor or purchaser can thereafter acquire a superior right, just so surely it leaves to other law exclusively the determination when such possibility ceases to exist.

It is usually local law that determines whether an assignee is vulnerable to the claim of a second assignee. It was so in *Corn Exchange National Bank* v. *Klauder, supra.* But whether it is state law or federal law, it is law outside the Bankruptcy Act to which we must look.

POINT II.

By reason of the assignment respondent had at least a property interest in the government payment of $155,865.50 out of which the $150,000 debt of Graves-Quinn was discharged that was superior to any right that any purchaser from or creditor of Graves-Quinn might acquire within four months of the filing of the petition.

Regardless of the import of the consent and filing, respondent had an assignment which attached to the government check in the hands of Graves-Quinn. Respondent

had that much without the Assignment of Claims Act of 1940. For the purposes of this action it does not need more.

Petitioner's interpretation of the Assignment of Claims Act of 1940 is predicated on a rigid construction of the statute (R. S. 3477) to which it is annexed. This in turn rests on *National Bank of Commerce* v. *Downie*, 218 U. S. 345. There were good grounds for the decision in that case, but the ground chosen by the court was disavowed in the later case of *Martin* v. *National Surety Company*, 300 U. S. 588.

Petitioner seeks to limit the applicability of what this court wrote in the *Martin* case. The facts of that case are not the facts of this case admittedly. But the opinion is not for that reason to be tossed aside. This court in considering the statute restricting the assignment of claims against the government had a purpose larger than the determination of a relatively small controversy. It avowedly intended to dispel "the confusion in which the subject is enveloped."

> "Our decision will be kept within the necessities of the specific controversy here. Even so, the grounds chosen, though narrower than those assigned below, may be expected to be helpful as a guide in other cases."

In construing the statute (R. S. 3477), this court had a choice between two lines of cases, one of which was represented by the *Downie* case.

> "The advocates of literalism find color of support in a line of decisions made in very different circumstances from these, but tending none the less to a strict construction of the statute * * *. We do not pause to inquire with reference to all the cases

whether the necessities of the judgment were as broad as the words of the opinion. Thus, in National Bank *v.* Downie, 218 U. S. 345, 54 L. ed. 1065, 31 S. Ct. 89, 20 Ann. Cas. 1116, 25 Am. Bankr. Rep. 199, *supra*, to give a single illustration, where the controversy was between the trustee in bankruptcy of the contractor and prior assignees, the claims against the Government which were the subject of the assignment had never been allowed, much less collected, though the decision cannot be said to have been put on that ground. Another line of cases exhibit an opposing tendency. * * * These cases teach us that the statute must be interpreted in the light of its purpose to give protection to the Government. After payments have been collected and are in the hands of the contractor or subsequent payees with notice, assignments may be heeded, at all events in equity, if they will not frustrate the ends to which the prohibition was directed. * * * To the extent that the two lines of cases are in conflict, the second must be held to be supported by the better reason. * * * An assignment ineffective at law may none the less amount to the creation of an equitable lien when the subject matter of the assignment has been reduced to possession and is in the hands of the assignor or of persons claiming under him with notice."

The court could deduce from the statute itself that there was no intent to interfere with assignments except in so far as government necessity requires. When that purpose is served, the rights of the assignee are to be recognized without regard to the time of making or form of the assignment.

"The very fact that an assignment is permitted even as between the contractor and the Government itself when the warrant is outstanding, if the transfer be executed with prescribed formalities,

> is significant that the Government is not concerned to regulate the equities of claimants growing out of irregular assignments when collection is complete and liability is ended. The purpose of the statute 'was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed.' * * * A transfer of the fund after payment is perfected is of no concern to any one except the parties to the transaction, and this quite irrespective of the time of the assignment or the manner of its making."

The Assignment of Claims Act of 1940 carried further the loosening of the restraints of section 3477 of the Revised Statutes. A construction of the amendment that leaves an assignee worse off than he would be without the amendment is unthinkable.

Without regard to any omissions on the part of respondent measured by the Assignment of Claims Act of 1940 it was entitled to the government check for $155,865.50 received by Graves-Quinn on November 27.

As matter of law respondent had legal title to the check at once upon its receipt by Graves-Quinn.

The plaintiff in *Fairbanks* v. *Sargent*, 117 N. Y. 320, an attorney, had been retained by one Underwood to prosecute a claim against one Zabriskie. To compensate him for past and current services Fairbanks was to have one-third of the recovery, whatever form the recovery might take.

Suit was brought against Zabriskie, and while it was pending Underwood, without Fairbanks' knowledge or consent, transferred the claim to Sargent as collateral security for an antecedent debt.

Thereafter a settlement was made between Underwood, Sargent and Zabriskie pursuant to which Sargent surrendered his assignment, Zabriskie paid Underwood $20,000

in certain bonds in full discharge of his debt, Underwood released Zabriskie and the bonds were delivered to Sargent in satisfaction of his claim against Underwood. Sargent received the bonds in ignorance of plaintiff's interest.

The action was brought by Fairbanks to recover one-third of the bonds. His right thereto was upheld.

> "The moment the release was delivered the bonds became in the legal possession of Underwood through the actual possession of his agent Gray, duly constituted for that special purpose. Underwood, therefore, at that instant, had both the legal title and possession, and it was from and through him, and not from or through Zabriskie, that Sargent acquired his title. At the moment, therefore, when the bonds became Underwood's and in the possession of his agent, the equity of Fairbanks became a legal title to one-third of the bonds in the hands of his co-owner. His equity was gone. The debt to which it pertained was dead and extinguished, and in the instant that the bonds came to the legal ownership of Underwood the share of Fairbanks came to his legal ownership, and the possession of Underwood became his possession (p. 336) * * *. Underwood could hold them in no other way than for himself and his associate, and so, not only was the equity of Sargent through his assignment subject to the prior equity of Fairbanks, but the latter drew to himself the legal title prior to the legal title of Sargent" (p. 337).

In *Central Trust Co.* v. *West India Imp. Co., supra*, the holding in the *Fairbanks* case was followed and extended.

> "I have already said that the case [Fairbanks *v.* Sargent] differs from the present one in that there the second assignee did not part with value at the time of his assignment, but took it as security for an antecedent debt. Nevertheless the defendant claimed

the benefit of the rule that while 'an assignee of a mere equity, like a chose in action, must indeed stand upon the title of his assignor, and must fail if his assignor had made a prior assignment of the same equity, but if, in addition to his equity he succeeds in acquiring the legal title without notice of the prior assignment, that title cannot be taken from him by the prior assignee,' and no point seems to have been made as to the character of the consideration for his assignment. Judge Finch, admitting for the argument only the existence of the rule, held that when the defendant's assignor received the bonds from the debtor, the right of the plaintiff, an earlier assignee, at once attached, and that to the extent of his interest he then acquired, not only the equitable but the legal title, a legal title that was not lost by the transfer of the bonds from such assignor to the defendant, because no new consideration was paid at the time of the transfer. Applying the same reasoning it would seem decisive of the present case. The instant the improvement company received the bonds in negotiable form from the colonial authorities, the plaintiff acquired the legal title thereto as against every one except subsequent purchasers for value and in good faith" (p. 327).

In re Leterman, Becher & Co., 260 Fed. 543, 546, the Court wrote:

> "And the Supreme Court of the United States has held it not unlawful to allow the accounts to remain in the possession of the assignor for collection. In making the collection he acts in a fiduciary capacity, and the money, when collected, becomes the specific property of the assignee or pledgee. *Clark* v. *Iselin*, 21 Wall. 360, 368; 22 L. ed. 568."

As matter of law also respondent's title to the check was not dependent upon the endorsement of Graves-Quinn,

though, as matter of fact, Graves-Quinn endorsed the check and respondent collected it.

In *Freund, et al.* v. *Importers & Traders National Bank*, 76 N. Y. 352, plaintiff drew and delivered a check upon defendant payable to the order of M. Oppenheimer & Sons. The payees delivered the check unendorsed to N. Blun & Sons in payment of a prior indebtedness. Blun had the check certified by defendant. Thereafter plaintiff undertook to stop payment of the check. Defendant, despite plaintiff's notice, paid the check and was sued by the depositor. Judgment for defendant was affirmed.

> "Doubtless there should have been upon the check the written endorsement of the payees, to have saved to it, in the hands of Blun, its original character and quality of negotiable paper. Having been transferred without indorsement Blun got the right only that he would have taken, had it been not negotiable at the start. But whatever right the payees had in the check, at the time when it was transferred to Blun & Sons, that right they could assign, and by the act of assignment did transfer * * * (p. 357). By the certification of a negotiable check, properly negotiated, the depositary of the fund checked upon becomes liable to the owner of the certified paper, and is bound to have in readiness the money to meet it, from the fund drawn upon. When the check is not negotiable, or has not been indorsed, but has by assignment come into the hands of a lawful owner, who has a right to enforce it against the maker, the effect is the same. * * * The rule to govern the transactions with this check, so far as it was accommodation paper, is not different from that which would control doings with an accommodation note. It is settled, that a holder of an accommodation note, without restriction upon him as to the mode of using it, may transfer it either in payment, or as collateral for an antecedent debt, and that the maker

will have no defense against it, in the hands of an indorsee (p. 358). * * * Blun & Sons became the lawful assignees and owners of the instrument, and entitled to have and enforce payment, and after the certification by the defendant, to have payment from it, at the charge of the plaintiffs" (p. 359).

When on November 27 Graves-Quinn mailed the check to respondent, it was only turning over to respondent that to which respondent had an unquestioned right. The mailing on November 27 was delivery to respondent on November 27.

> "'Delivery' means transfer of possession, actual or constructive, from one person to another."
>
> §191 Uniform Negotiable Instruments Act,
>
> §2 New York Negotiable Instruments Law.

That mailing constitutes delivery is further supported by the following cases, to which reference is made elsewhere (*infra*, Point IV):

> *Chapman* v. *Mills & Gibb*, 241 Fed. 715;
> *People* v. *Continental Casualty Co.*, 157 Misc. 15;
> *Bainbridge* v. *Hoes*, 163 App. Div. 870.

Were it to be assumed that as late as November 27 respondent had merely an equitable, as distinguished from a legal claim to the government payment, that is enough. The Supreme Court of New York, in which petitioner elected to bring his suit, is a court of equity accustomed to upholding equitable principles. The same is true of the bankruptcy court itself.

> "A bankruptcy court is a court of equity, §2, 11 U. S. C. A. §11, and is guided by equitable doctrines and

principles except insofar as they are inconsistent with the Act."

Securities & Exchange Commission v. *U. S. R. & Imp. Co.*, 310 U. S. 434.

Petitioner's use of *Judson* v. *Corcoran*, 17 How. 612 (brief, p. 17), is typical of his flight from the realities of this case. How respondent would come out in a contest with a subsequent assignee in possession of the subject matter of the pledge is not an issue here.

Whether a second good faith assignee who has collected is entitled to retain or must account to the first assignee depends on the jurisdiction where the question arises. New York requires a second assignee to turn over. (*Superior Brassiere Company, Inc.* v. *Zimetbaum*, 214 App. Div. 525; *Central Trust Co.* v. *West India Imp. Co.*, 169 N. Y. 314). Some other states permit the second assignee who collects to retain. Before *Erie RR. Co.* v. *Tompkins*, *supra*, the latter rule was followed in the federal courts.

Even in jurisdictions where the second assignee who collects is protected, notice to the debtor is not the equivalent of collecting. Referring to *Judson* v. *Corcoran*, this court in the *Salem Trust Company* case, *supra*, said:

> "Clearly, that case does not hold that mere priority of notice by a later assignee will subordinate the rights of the first purchaser."

Moreover, an assignment as such is not impaired though the rights of the assignee may be lost to a later assignee who realizes on his assignment. To quote again from the *Salem Trust Company* case:

> "It is not accurate to say that notice is necessary to perfect title in the assignee of a chose in action. While failure to give notice may become an important

element in a situation from which equitable estoppel may arise against the first assignee, it cannot be said to be necessary to, or an element in, acquisition of title."

It makes no difference here whether by the tests of section 60a of the Bankruptcy Act the transfer is deemed made when title is acquired or only when the possibility of a second assignee with a defense based on collection is forever gone. On November 27 there was no second assignee to collect. On November 27 Graves-Quinn received the government check and mailed it to respondent. As to this payment at least all possibility of a second assignee was extinguished on November 27.

It is decisive of our contention under this head that the events of November 27 fell outside the four months' period. Petitioner is bound by the facts of that day. He cannot urge in derogation of the transfer any mere potentialities. His authority to assail the transfer in the right of the phantom creditor of section 60a is expressly limited to the period extending backward four months from the filing of the petition. When a transfer is found to be consummated before the statutory deadline it is as conclusive against the trustee as against the assignor.

The Court of Appeals in affirming the Appellate Division put its decision on the unshakable ground that regardless of the effect to be given to the consent and the filing the transfer to the extent at least of the security out of which respondent was paid was perfected, as that term is defined in section 60a, on November 27.

The notion so industriously cultivated by petitioner that controlling federal law went unheeded in the Court of Appeals will not bear scrutiny.

What petitioner sees as departure from the mandate of the Assignment of Claims Act is in reality deference to the

federal courts in the initial interpretation of a federal statute. The Court of Appeals avoided taking a position on the effect, if any, of delay in the consent and filing.

It was the combination of events culminating on November 27 and beyond the power of the trustee to challenge vicariously that settled the issue for the Court of Appeals.

When Judge Lehman wrote that applicable state law "must be applied here" (R. 103) he was not setting up standards alternative to federal standards. He had already examined the Assignment of Claims Act and found that as between the parties the assignment at least effected "an inchoate transfer of the assigned rights or property" (R. 103). The question remained whether the assignment was perfected within the meaning of section 60a. Was there any applicable state law governing the rights of creditors and successive assignees by which respondent might be deprived of the benefit of the assignment? As to the government payment of $155,865.50 there was no need to pursue the inquiry further than to take note of the events of November 27.

> "It is unnecessary to decide * * * whether a purchaser for value or a creditor could have obtained any rights in the moneys until they were paid to the contractor and the check mailed to the defendant on November 27. It seems clear that at least from that time the transfer was perfected.
>
> "Certainly when the contractor received payment by check from the government on November 27 it was in good faith bound to deliver the check or its proceeds to the defendant in accordance with its agreement as evidenced by the executed assignment" (R. 104).

We do not know whether it can be properly said that the surety was a creditor in November, 1940. Assuming it was, what the court wrote is as applicable to it as to any

other creditor. The authority of the trustee is not enlarged by reason of the fact that the bankruptcy proceeding is the individual venture of the surety. If the surety is entitled to the money, petitioner is not entitled to it though he is the tool of the surety. By section 60a, which is the source of petitioner's authority, it is "property of a debtor" only that a trustee can recover. The transfer by Graves-Quinn to respondent of funds in its hands which it was obligated to turn over to the surety lacks the basic ingredient of a preferential payment. Petitioner as trustee in bankruptcy has no legitimate interest in the disposal by Graves-Quinn of money received (if it was so received) for the account of the surety.

To ask us to believe that the surety would have promoted the bankruptcy of Graves-Quinn for the purpose of a preference suit brought by a trustee if it had a right to the money received by the bank is asking too much. If the surety was wronged by the transfer it had a far better remedy than bankruptcy proceedings. In the bankruptcy court the surety participates only as a general creditor (on a parity with respondent, incidentally) after expenses and debts entitled to priority are paid in full (section 64a).

Petitioner says (brief, p. 21) the Court of Appeals mistook his purpose in advancing the claim of the surety. However that may be, the court made no mistake in rejecting it as a significant factor in the case.

It is idle to talk about what the surety might have done prior to November 28 had it known (assuming it did not know) of the assignment to the bank. We are here concerned with whether the transfer to the bank did or did not occur outside the four months' period, and it is begging the question to speculate on whether under other circumstances the surety might have done what it did not do. The trustee can no more maintain his suit on what the

surety failed to do, whatever the reason, than on what the debtor actually did, whatever its motives, outside the four months' period. The omissions of the surety, like the acts of the debtor prior to November 28 are conclusive on the trustee.

In this connection also petitioner taxes our credulity. If there were defaults by Graves-Quinn within the meaning of its agreement with the surety, the surety did nothing about it. And when it received notice of the assignment it did not precipitate the bankruptcy of Graves-Quinn which we are asked to believe would have been done had notice of the assignment been given earlier.

When the surety received the notice of December 2 (R. 13) there was owing to respondent from Graves-Quinn $82,000 (Ex. A, R. 8). The surety was in position to do then anything it might have done prior to November 28. It did not seek to frustrate respondent by causing a petition in bankruptcy to be "immediately filed" (brief, p. 22). Instead it wrote the letter of December 6, reading in part as follows (R. 37, 38):

> "In consideration of such loans as have heretofore or which hereafter may be made by you to Graves-Quinn Corporation, we agree that we, acting alone or with others, will commit no act in any wise to interfere with the performance by Graves-Quinn Corporation of work to be done under said contract until such time as your loans are fully repaid."

The surety waited for bankruptcy proceedings until, with the help of respondent, Graves-Quinn completed performance of its contract. Now it would make respondent an unpaid creditor to the amount of $150,000.

To say that there is no merit in fact or in law to a single contention made on behalf of the surety is to put it mildly.

POINT III.

As payment of the debt on November 28, 1940, was made from security, the time of the transfer was the time when the security position was perfected on or before November 27, 1940.

To say that payment of a debt within the four months' period does not fix the time of transfer if the payment is made out of security is only to state the obvious. The right in the security, of course, is determined as of the time it is received and not as of the time it may be liquidated and the debt paid therefrom.

The rule is no different in the case of choses in action. The right in the security does not depend on receipt of the avails of the assignment.

In *Okin* v. *Isaac Goldman*, 79 F. (2d) 317, plaintiff was trustee in bankruptcy of Quality Publications, Inc., a publisher. Defendant was a printer to whom the bankrupt had assigned as security moneys due and to become due from two distributors of the bankrupt's magazine, one of which was the American News Company.

Payments received were applied by the assignee to past, as well as debts incurred subsequent to the assignment. All the payments were received within four months of the filing of the petition.

> "The payments were alleged to be voidable preferential transfers made within four months of the filing of the petition on January 7, 1932, and the suit was in terms founded upon section 60b of the Bankruptcy Act, 11 U. S. C. A., section 96(b)." (p. 318).
>
> * * * * * * *
>
> "The magazines were distributed to the American News Company prior to September 7, 1931, or more than four months before the filing of the peti-

tion in bankruptcy, and charged to American News Company on its books as and when delivered at 15 cents per copy with a credit of 15 cents for each copy that was not sold. Thus the defendant held an assignment of plaintiff's accounts with the American News Company, covering the issues of May, June, and July, which arose prior to September 7, 1931, although the payments in question were not received until after (p. 319).

* * * * * * *

"In view of the foregoing, the payments to the defendant by the American News Company, in our opinion, created no preference irrespective of whether or not they were upon an antecedent indebtedness to the latter or in liquidation of advances made after April 8, 1931, when the assignment was executed. This is because all of the accounts covered by the assignment arose outside of the four months' period" (p. 320).

In *Rockmore* v. *Lehman*, 129 F. (2d) 892, *supra*, the payment attacked as preferential was made after the filing of the petition. The ultimate decision in that case represented an advance beyond the position taken by the same court in the *Okin* case.

When the *Rockmore* case was first before the Circuit Court, 128 F. (2d) 564, the majority of the court, as was subsequently admitted upon the reargument, misapprehended the nature of assignments of money to become due under a subsisting contract. Because the moneys assigned had not yet been earned, the majority mistakenly deemed the assignments "no more than promises to pay the assignees out of funds to be created by the assignor's labor." That, as Judge Clark observed in the dissenting opinion, was "going back in essence to antique views of the non-assignability of choses in action."

It is settled now that the assignment of moneys to become due under an existing contract stands or falls as against a trustee in bankruptcy not as of the time the moneys assigned are received and applied on the debt, but as of the time the assignment is perfected by the test of section 60a. Here that time as to the government payment of $155,865.59 was not later than November 27.

The fact that respondent carried the notes of Graves-Quinn that were retired on November 28 as unsecured does not discredit the assignment. In respondent's loan ledger (Ex. A, R. 8) the subsequent notes of Graves-Quinn as well were carried as unsecured. That did not detract from the assignment. Throughout December, 1940 and January, 1941, the government made payments direct to respondent pursuant to the assignment (R. 7).

Of course, a security status is not disproved by book entries or other routine entries, any more than a security status is proved by such entries. The relevant facts and not a misnomer determine the issue. Ignorance of the facts even would make no difference (*Mutual Trust Co.* v. *Mercantile National Bank*, 236 N. Y. 478, 87; *Irving Trust Company* v. *Leff*, 253 N. Y. 359, 62).

Whatever the book set-up, respondent was entitled to the avails of the contract. And this is so, though the fact that the right constituted security went unrecognized.

Petitioner in Point VI of his brief is critical of the routine followed in retiring the loan. He puts form above substance. He is doing now what he did in his complaint when he ignored altogether (1) the assignment received by respondent on November 22; (2) the fact that the government payment out of which respondent was paid was received by Graves-Quinn on November 27 and at once turned

over to respondent, and (3) the further fact that the government payment was covered by the assignment.

In his brief (p. 24) petitioner is still maintaining that these facts are meaningless. He cites as "most pertinent" a case (*In re National Lumber Co.*) involving a transfer to an unsecured creditor two days before the filing of the petition (brief, p. 25).

To a litigant who like petitioner overlooked matter of substance only to quibble over unimportant details, the Court of Appeals gave a short answer in *Whiting v. Hudson Trust Co.*, 234 N. Y. 394, 402:

> "Rights and wrongs are not built upon distinctions so inconsequent."

The federal courts have given a like answer (see Point IV, *infra*).

Certainly the right of respondent to payment of its debt out of the government remittance was not lost in the very mechanics of effecting the payment. Routine is not the stuff out of which a forfeiture is wrought.

POINT IV.

The mailing of the government check for $155,865.50 to respondent on November 27, 1940, was a delivery on that day, and against this check, treated as a routine deposit, respondent had a right of setoff which is beyond the reach of petitioner.

Every deposit by a depositor who is indebted to his bank is a potential item of setoff. To be sure, every such deposit, if set off, is likewise a potential item of preference by section 60a of the Bankruptcy Act in the event of the bankruptcy of the depositor. But there can be a preference

only if the deposit set off is made within four months of the filing of the petition.

In *Merrimack National Bank* v. *Bailey*, 289 Fed. 468 (cert. den. 263 U. S. 704), there was application by the bank of deposits made against debts of the depositor. The court wrote:

> "Such deposits or payments to the bank give the bank an inchoate or conditional lien by way of set-off. They are 'transfers' within the meaning of section 60a of the Bankruptcy Act (Comp. St. §9644). If, as in this case, they are made when the depositor is insolvent and when the bank has reasonable cause to believe that such deposits, or loans, or payments, to the bank, will effect a preference, they are, if within the four months period, voidable."

Making the deposit within four months of the filing of the petition was listed as one of the elements necessary to a voidable setoff also in *Elliotte* v. *American Savings Bank & Trust Co.*, 18 F. (2d) 460.

The fact that Graves-Quinn issued its check for $150,000 in payment of the notes does not deprive respondent of the right of setoff otherwise available.

> "Further, throughout the period we are now considering the deposits were made *in the regular course of business*, and, in the absence of fraud or collusion between the bank and the bankrupts with a view of creating a preferential transfer (Bank *v.* Massey, 192 U. S. 138, 148, 24 S. Ct. 199, 48 L. Ed. 380), the bank had a lien thereon and a right of set-off thereunder, the effect of which was not destroyed by the fact that the depositors' voluntary checks were taken for payments on the bank's paper, instead of applying the deposits directly thereon (Studley *v.* Boylston Bank, 229 U. S. 523, 526, 33 S. Ct. 806, 57

L. Ed. 1313; Toof *v.* Bank (C. C. A. 6) 206 F. 250, 252; American Bank, etc., Co. *v.* Coppard (C. C. A. 5) 227 F. 597; Walsh *v.* Bank (C. C. A. 6) 201 F. 522)."

Elliotte v. *American Savings Bank & Trust Co.*, 18 F. (2d) 460.

"The record presents the single question of law as to whether the defendant bank waived its right to set off the deposit against the notes, under section 68 of the Bankruptcy Act (Comp. St. §9652), by accepting the check of the bankrupt, in advance of bankruptcy, and while the bankrupt was insolvent, and in contemplation of bankruptcy.

* * * * * * *

"A preferential payment is one that gives to the creditor paid something he would not have obtained through bankruptcy proceedings, and that would have been ratably distributed among all creditors of the same class, after bankruptcy had intervened. The payment of a note by a check on a deposit of the maker has no such effect. The Bankruptcy Act itself would do what the parties voluntarily did, had they omitted to do it. What the payment of the check transferred to the bank was only what the bank would have obtained as against other creditors of the same class, upon the filing of the petition, through the obligation of the trustee to apply the deposit to the payment of the notes in stating the account between the bank and the bankrupt. The payment of the check could have no effect to give the bank a greater percentage of its debt than other creditors of its class, since it would receive through payment by check only what the Bankruptcy Act would give it, though no such payment had been made to it. As the payment of the check was not a preferential payment, but merely a voluntary accomplishment of an offset, which was provided for by the Bankruptcy Act in the

absence of voluntary action, we see no reason for disallowing the offset because the parties anticipated the action of the law, even though the bankrupt was then insolvent within the knowledge of the bank."

Jandrew v. *Guaranty State Bank of Oxilla*, 294 Fed. 530.

In *Studley* v. *Boylston Bank*, 229 U. S. 523, plaintiff, trustee in bankruptcy of Collver Tours Co., sought to limit the applicability of the setoff provisions of the statute (section 68a) by excluding setoffs made by the parties themselves before the filing of the petition. In denying any such limitation, this court wrote:

"That section did not create the right of setoff, but recognized its existence, and provided a method by which it could be enforced even after bankruptcy. What the old books call a right of stoppage—what businessmen call setoff—is a right given or recognized by the commercial law of each of the states, and is protected by the bankruptcy act if the petition is filed before the parties have themselves given checks, charged notes, made book entries, or stated an account whereby the smaller obligation is applied on the larger.

"* * * But there is nothing in 68a which prevents the parties from voluntarily doing, before the petition is filed, what the law itself requires to be done after proceedings in bankruptcy are instituted.

* * * * * *

"The bankruptcy act recognizes this right, and it cannot be taken away by construction because of the possibility that it may be abused."

In *Kolkman* v. *Manufacturers Trust Co.*, 27 F. (2d) 659, plaintiff was trustee in bankruptcy of Kewa Novelty Company. Defendant held two notes for $2,500 each, made by

the bankrupt, one maturing on December 18, the other on December 29, 1924. On December 10 the bankrupt paid the two notes by a check upon its account with defendant. The petition was filed on December 15.

The trustee sued to recover the $5,000 payment. It appeared that the bankrupt's balance on December 9 was $3,517.13, and that a deposit of $6,000 was made on December 10. The court held that while the deposit of $6,000 was in effect itself preferential and, therefore, unavailable as a setoff, the same infirmity did not attach to the prior balance of $3,517.13.

> "Only to the extent necessary to make good the nullified check, can it be said that the deposit was made with intent to prefer the bank. Therefore the bank was entitled to a setoff of $3,517.13. To the extent of $1,482.87 the deposit was made with intent to prefer the bank, and is nullified by the statute."

Of particular significance at this point was the holding of the court that the setoff claimed was available though the notes were not due.

> "After bankruptcy, the privilege of setoff is not confined to debts which were due, provided they are provable. In re Semmer Glass Co., 135 F. 77 (C. C. A. 2); Remington Bankruptcy (3d Ed.) § 1455. When the petition in bankruptcy was filed, the bank is to be deemed to hold $5,000, since the payment of the check for that sum was nullified by section 15, on deposit for the bankrupt."

It is clear that the privilege of setoff does not depend on the routine by which it is effected. A deposit made outside the four months' period is beyond the reach of the trustee no matter when or how it is applied to a debt owing.

Every preference is by the statute (section 60a) related to a transfer as that term is defined in section 1(30):

> "'Transfer' shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security or otherwise."

The transfer of the government check which Graves-Quinn endorsed and mailed to respondent on November 27, 1940, occurred on the day of mailing. It was then that Graves-Quinn parted with possession of, and property in the check.

In *Chapman* v. *Mills & Gibb*, 241 Fed. 715, an equity receivership, Mills & Gibb about noon of May 12, 1916, endorsed to the order of the Merchants National Bank of Providence, R. I., a number of customers' checks, made out a deposit ticket and mailed the checks and deposit ticket to the bank with the intention that the checks should be collected and credited to the account of Mills & Gibb. After the mailing, and on the same day, May 12, 1916, application was made for the appointment of receivers for Mills & Gibb, and receivers were appointed who duly qualified.

After appointment of the receivers and on May 13, 1916, the checks were received by the bank in Providence, whose officers at the time knew of the appointment of the receivers. The checks were collected and applied as collected on overdue notes of Mills & Gibb held by the bank. The receivers disputed the action of the bank.

The question was: Who had the better right to the checks, the receivers or the bank which applied the proceeds upon the notes of Mills & Gibb? In opening his opinion, Judge Mayer wrote:

"Preliminarily it may be stated that the bank has a general lien or title to the checks by virtue of the indorsement and mailing prior to the appointment of receivers in this jurisdiction, irrespective of the physical receipt by the bank unless the appointment of receivers intermediate between the time of the physical mailing and the time of the physical receipt gave the right of possession to the receivers in New York, and that, in such case, the bank would have the right to offset the proceeds of the checks against the overdue notes of Mills & Gibb."

The court stated its problem to be "* * * the effect, in law, of the mailing of the checks prior to the appointment of receivers in the main proceeding in New York."

It is apparent from the opinion that the receivers relied on the postal regulations whereby mailed matter may be recalled by the sender as an impairment of the delivery. The court refused to permit an unexercised right of recall to bedevil the case.

"It may well be that interesting questions would arise if the sender had recalled its letter and the Post Office Department had returned the letter before it reached its intended destination. That, however, is not this case. Some of the cases cited speak of the Post Office Department as an agent, but I am inclined to think that that is rather a loose way of designating the position and function of the department in a case such as this.

* * * * * *

"The basic question in the case is, When did Mills & Gibb lose control of these checks? and the answer is, The moment they were placed in the mail. In that connection it must be emphasized and remembered that the intention of Mills & Gibb is the controlling fact in this case. That intention was

to part forever with possession of these checks, and to cause them to go forward without interference by Mills & Gibb, or anybody else, until they reached their destination. * * *

"* * * The vital point is that Mills & Gibb, by their own act and in accordance with their own intention, relinquished and lost possession of these checks about noon, May 12, 1916, and that Mills & Gibb and the receivers (in addition to any other reasons which may be advanced) for this reason never had the right, at any time after noon of May 12, 1916, to the possession of these checks."

In *People* v. *Continental Casualty Co.*, 157 Misc. 15, 20, the court wrote:

"Also, when the check was deposited in the mail, it was a constructive delivery to Maxwell Brothers, Inc.

"Section 2 of the Negotiable Instruments Law provides that 'delivery' means transfer of possession, actual or constructive, from one person to another.

"When the check was placed in the mail addressed to Maxwell Brothers, Inc., it was a constructive delivery. (Bainbridge *v.* Hoes, 163 App. Div. 870.)"

In *Bainbridge* v. *Hoes*, 163 App. Div. 870, one Guipon in New York, mailed a check to one Foster in Boston. The check was dishonored on presentation because of the death of the drawer. The contest was between the assignee of the payee, and the public administrator.

The case was tried before a referee. That part of his opinion which is pertinent here follows:

"I have considered whether the gift could be sustained as one *inter vivos* because it seemed to me

the most favorable view for the plaintiff. The delivery of the letter with the check to the U. S. Post Office was clearly a delivery to the donee's agent (Kennedy *v.* Kennedy Corp., 32 Misc. 480; Com. *v.* Woods, 142 Mass., 459; U. S. *v.* Nutt, 6 Am. L. Rec., 302); and so the fact that the check did not reach Miss Foster till after Guipon's death does not of itself take it out of the class of gifts *inter vivos*."

The Appellate Division affirmed upon the opinion of the referee.

To characterize the Post Office Department as agent of the addressee may well be deemed a loose manner of speaking. It is just one way of saying that deposit in the mails is a delivery.

When the government check was put in the mail on November 27 there was a delivery by Graves-Quinn to respondent. With the deposit the transfer was perfected just as surely as the pledge of a chattel is perfected by a change in possession or a sale by recording the deed. Nothing remained to be done by either Graves-Quinn or respondent. According to both reason and authority, when that point was reached Graves-Quinn had divested itself of possession and the transfer was beyond the reach of any purchaser from or creditor of Graves-Quinn.

Petitioner's exploitation (Point VI) of the fact that the government check was credited to the account of Graves-Quinn on November 28 is as futile under this head as in relation to the assignment. It made no difference in *Chapman v. Mills & Gibb, supra*, that the checks came to hand and were credited to the depositor's account after the appointment of the receivers. Nor that the proceeds were thereafter applied on notes held by the bank. What mattered was the fact of mailing prior to the appointment.

The stipulation of facts as reported in that case discloses the routine followed.

> "'The said checks were forwarded by Mills & Gibb with the intention that they should be collected by the said Merchants National Bank, and that the proceeds thereof, when collected, should be credited to the account of Mills & Gibb with said bank, and the said bank received the said checks and credited the account of Mills & Gibb with the face amount thereof, subject to the right to charge back against the account of the said Mills & Gibb any of the said checks which were not collected, and subject also to any exchange or collection charges, and the said checks were so credited by the said bank to Mills & Gibb in its account with the latter corporation.'"

The time of the transfer of the government check is not to be identified with the time of payment of the debt. As in the *Chapman* case and others to which reference has been made, the antecedent action of the depositor determines the time of the transfer.

Conclusion.

In moving for summary judgment dismissing the first count of the complaint respondent undertook to show upon undisputed facts that the transfer occurred outside the four months' period. The necessary showing was made to the satisfaction first of the five Justices of the Appellate Division and later of the seven Judges of the Court of Appeals.

The Appellate Division decided in respondent's favor on the ground that the assignment was valid as of its delivery under the Assignment of Claims Act of 1940 as construed by it (Point I, *supra*). The Court of Appeals, avoiding unneeded interpretation of this federal law, set

its decision on the facts peculiar to the case by reason of which respondent is entitled to judgment however the statute is construed.

Petitioner in seeking to discredit the opinion of Judge Lehman, writing for the Court of Appeals, has summed up his exceptions to that opinion in four "Specification of Errors" (brief, p. 7). These specifications are remarkable for the consistency with which they misconstrue the opinion attacked.

The Court of Appeals did not, as stated in Specification 1, hold that the filing related back to the date of delivery of the assignment on November 22, 1940, as against the trustee in bankruptcy. What the Court of Appeals held was that after Graves-Quinn had received the government payment and mailed it to respondent on November 27, the transfer was perfected by the test of section 60a. That concludes petitioner. As a trustee in bankruptcy he has no more than a creditor or purchaser could acquire after November 27. Neither could acquire anything.

The Court of Appeals did not, as stated in Specification 2, hold that no purchaser or creditor could acquire a superior right in the moneys assigned between the date of the execution of the assignment and the date of filing and notice. Its holding was limited to the payment of $155,865.50 received by Graves-Quinn and turned over on November 27, 1940.

The Court of Appeals did not, as stated in Specification 3, hold that the assignment to respondent takes precedence over a prior assignment to the surety. The holding was in effect that if the surety has a superior right to assert it must assert such right in its own behalf. In any case, the trustee in bankruptcy cannot maintain an action in the right of the surety.

The Court of Appeals did not, as stated in Specification 4, hold that the doctrine of relation back was not repudiated by this court in *Corn Exchange National Bank* v. *Klauder*, *supra*. But if it had so held, the holding would be correct. The conclusion of the text book writer which petitioner adopts (brief, p. 18) is palpably erroneous.

We are at a loss to understand petitioner's reliance on the *Klauder* case. The law of Pennsylvania at the time respecting perfection of assignments was not federal law. It was accepted by the federal courts pursuant to the doctrine of *Erie RR. Co.* v. *Tompkins*, *supra*. In *Rockmore* v. *Lehman*, *supra*, the federal courts accepted the New York law on the subject.

When petitioner suggests (Point V) that federal law was neglected in the Court of Appeals, does he mean that since the *Klauder* decision the former Pennsylvania rule is federal law?

Because the events of November 27 did not occur within the four months' period the Court of Appeals had no occasion to declare that perfection of the assignment here did not depend on notice to the debtor. No second assignee could come between respondent and the government payment of $155,865.50 within the four months' period even if the now obsolete Pennsylvania rule were applicable.

The burden which petitioner assumed of showing that the court of last resort of the State of New York erred in affirming the judgment of the State Supreme Court has not been met. The distortion of the court's opinion upon which the argument of petitioner rests is persuasive that the true basis of the decision is unassailable.

We think an affirmance by the Court of Appeals on the opinion of the Appellate Division would have received the approval of this court because of the soundness of that opinion.

In any case the decision of the Court of Appeals was right. And its opinion gives to the decision the increase of strength that comes from reliance on settled law.

The decision of the Court of Appeals of the State of New York should be affirmed.

Respectfully submitted,

WILLIAM A. ONDERDONK,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 188.—October Term, 1944.

Albert E. McKenzie, as Trustee in Bankruptcy of Graves-Quinn Corporation, Petitioner, *vs.* Irving Trust Company.	On Writ of Certiorari to the Court of Appeals of the State of New York.

[January 8, 1945.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Petitioner, trustee in bankruptcy of Graves-Quinn Corporation, the debtor, brought this suit in the Supreme Court of New York to recover the sum of $150,000 paid by the debtor to respondent, its creditor. The payment was alleged to be an unlawful preference under § 60a of the Bankruptcy Act, 11 U. S. C. § 96. Respondent moved for summary judgment under Rule 113 of the New York Rules of Civil Practice, on the ground that the transfer did not occur within four months of bankruptcy, and hence was not a preference under § 60a. The Supreme Court of New York denied the motion, but the Appellate Division of the Supreme Court reversed, dismissing the complaint. 266 App. Div. 599. The New York Court of Appeals affirmed, 292 N. Y. 347, holding that the transfer was not made within four months of bankruptcy.

We granted certiorari, 323 U. S. —, on a petition raising questions important to the administration of the Bankruptcy Act, only one of which we find it necessary to decide. That question is whether a check, made payable to the bankrupt and endorsed and mailed by it to respondent more than four months before bankruptcy, but received by respondent and credited upon the bankrupt's antecedent debt within the four months, is, by the applicable law, a transfer within the four months period, within the meaning of § 60a.

In September, 1940, the Graves-Quinn Corporation, later adjudicated a bankrupt, entered into a contract with the United States, acting through the War Department, for the construction

of military housing. The required payment and performance bond was given by a surety to the Government, and at the same time, October 2, 1940, the surety took from the debtor as security an assignment of all sums payable on the contract.

Beginning in October, 1940, respondent, a trust company, made loans from time to time to the debtor to finance its operations under the government contract. It was agreed that the loans were to be repaid from the money to be received under the contract. On November 20, 1940, the debtor executed and on November 22 delivered to respondent a written assignment of these moneys to become due. The assignment was made without at that time giving the notices and procuring the consent of the Secretary of War, which, by the Assignment of Claims Act of October 9, 1940, 54 Stat. 1029, amending R. S. § 3477, 31 U. S. C. § 203, were required in order to give validity to the assignment.[1]

On November 27, 1940, after the assignment, the Government delivered to the debtor its check for $155,865.50 as a progress payment then due upon the contract. The debtor on that date endorsed the check and mailed it to respondent, accompanied by its own check for the sum of $150,000, made payable to respondent and drawn upon the debtor's account with respondent. On November 28th, which was exactly four months before the petition in bankruptcy was filed on March 28, 1941, respondent received the checks and credited $150,000 of the proceeds of the Government check on four promissory notes of the debtor, aggregating $150,000.

On November 27 respondent sent to the Secretary of War its assignment of the sums due and to become due on the contract, and on December 2, gave the other notices required by the statute regulating assignments of claims against the United States. On December 5, the assignment was approved by the Secretary of

[1] Section 3477 of the Revised Statutes, 31 U. S. C. § 203, declares that the assignment of any claim upon the Government shall be "absolutely null and void" unless made after the allowance of the claim and the issue of a warrant for its payment. But by the amendment of October 9, 1940, it was provided that such assignments of claims in excess of $1,000 for money due or to become due from an agency or department of the Government upon contracts entered into with the Government before the date of the amendment should be valid when made to a bank or trust company upon notice to the surety on the contractor's bond, and to certain specified officers of the Government, including the contracting officer or head of the department concerned, and upon consent of the head of that agency or department.

War, and on that date the conditions of a valid assignment, prescribed by the statute, had been fully satisfied.

By § 60a of the Bankruptcy Act "a transfer . . . of any of the property of a debtor to . . . a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition in bankruptcy . . . , the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class" is declared to be an unlawful preference. Only a single issue was raised by respondent's motion for summary judgment, whether the debtor's transfer to respondent of $150,000 of the progress payment by the Government was made and perfected more than four months before the petition in bankruptcy was filed.

The Court of Appeals resolved this question in respondent's favor upon two independent grounds. One is that while the assignment was not perfected until December 5, 1940, within the four months period, when the necessary notices had been given and consent obtained, the assignment was to be regarded as then retroactively validated as of its date of November 22, 1940, which was more than four months before the bankruptcy. The other ground is that the transfer became complete on the debtor's endorsement and mailing of the Government check to respondent on November 27, more than four months before the bankruptcy.

As we sustain the judgment on the second ground we have no occasion to consider the first or to express any opinion upon it. For the purpose of determining the adequacy of the second ground, it is unnecessary to consider the effect of the assignment upon the right of respondent, as an assignee, to demand payment from the Government or the assignor of the amounts due on the contract. For here the payment was made by the Government to the assignor, which paid it to respondent before the assignment was validated by the requisite notices and consent. The provisions of the statute governing assignments of claims against the Government are for the protection of the Government and not for the regulation of the equities of the claimants as between themselves. *Martin* v. *National Surety Co.*, 300 U. S. 588, 594-595. Here, the payment having been made to the contractor and by it delivered to respondent before the assignment was perfected, the Government's obligation was dis-

charged; and the situation was no different than it would have been if no assignment had been made. The question is thus presented whether the endorsement and mailing of the check to respondent operated as a transfer on the date of mailing, rather than on the date of its receipt, so that the transfer was made and perfected before the four months period.

What constitutes a transfer and when it is complete within the meaning of § 60a of the Bankruptcy Act is necessarily a federal question, since it arises under a federal statute intended to have uniform application throughout the United States. *Prudence Corp.* v. *Geist*, 316 U. S. 89, 95, and cases cited; *Steele* v. *Louisville & Nashville R. R. Co.*, No. 45, decided December 18, 1944, p. 9 of slip opinion. The statute provides its own definitions. Section 1(30) of the Bankruptcy Act declares that "'transfer' shall include the sale and every other . . . mode . . . of disposing of or of parting with property . . . or with the possession thereof . . . ." And § 60a provides that a "transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein. . . ."

In the absence of any controlling federal statute, a creditor or bona fide purchaser could acquire rights in the property transferred by the debtor, only by virtue of a state law. And hence § 60a's "apparent command is to test the effectiveness of a transfer, as against the trustee, by the standards which applicable state law would enforce against a good faith purchaser." *Corn Exchange Bank* v. *Klauder*, 318 U. S. 434, 436-7. See also *Benedict* v. *Ratner*, 268 U. S. 353, 359, and cases cited. Section 60a in this respect, as do numerous other federal statutes, see *Davis Warehouse Co.* v. *Bowles*, 321 U. S. 144, 153-156, and note 20 and cases cited, thus adopts state law as the rule of decision. The state standards which control the effectiveness of a transfer likewise determine the precise time when a transfer is deemed to have been made or perfected.

As we have seen, § 1(30) includes in the term "transfer" "every . . . mode of . . . parting with property . . . or with the possession thereof". When the debtor endorsed the Government check and placed it in the mails, he parted with the possession

and intended to part with the property in it, at a time (before the four months period) when the transfer of the property to respondent would not be an unlawful preference. Whether the transfer was perfected on mailing the check thus turns on a question of state law, to which the highest court of the state has here given an authoritative answer.[2] The Court of Appeals recognized that only such a "parting with property" in the check, as would preclude the debtor from transferring any interest in the check to a creditor or bona fide purchaser, would perfect the transfer to respondent within the meaning of § 60a. The court also recognized that in this respect state law controlled decision. It found it unnecessary to consider whether a creditor or bona fide purchaser could have obtained rights in the $150,000 prior to the endorsement and mailing of the government check on November 27, since it thought that the "delivery of the moneys to the assignee was complete" at that time.[3] The state court having applied the proper test under § 60a, we accept its conclusion that the transfer was made more than four months before bankruptcy

[2] The endorsement and mailing of the government check took place in Boston, Massachusetts. There is no contention that the substantive law of Massachusetts determines the legal effect of these acts, nor that that law differs from the law of New York. Hence it is unnecessary to decide whether the problem of choice of law under § 60a is to be resolved by federal standards, or whether that section also adopts the conflict of laws rules of the forum. If the former be the case, it would be necessary for this Court to determine whether the New York Court of Appeals should have followed Massachusetts law; and if so this Court would be under the duty of making an independent investigation of the Massachusetts law. Cf. *Barber* v. *Barber*, No. 51, decided December 4, 1944, page 3 of slip opinion; *Adam* v. *Saenger*, 303 U. S. 59, 64, and cases cited. But if the statute adopts the local conflict of laws rules, the present case would turn on New York law, even though the applicable rule adopted by New York were the same as the substantive law of Massachusetts. For "Even where the state of the forum adopts and applies as its own the law of the state where the injury was inflicted, the extent to which it shall apply in its own courts a rule of law of another state is itself a question of local law of the forum." See *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 445, and cases cited.

[3] The Court of Appeals said, 292 N. Y. 347, 358-359: "The test under the statute as amended in 1938 is, as I have said, whether no 'bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein.' The 'standards which applicable state law would enforce against a good faith purchaser or against a creditor must be applied here.' . . . It is unnecessary to decide . . . whether a purchaser for value or a creditor could have obtained any rights in the moneys until they were paid to the contractor and the check mailed to the [respondent] on November 27th. It seems clear that at least from that time the transfer was perfected. . . . [From] the time that the check was deposited in the mail . . . delivery of the moneys to the assignee was complete."

Petitioner, relying on *Martin* v. *National Surety Co.*, *supra*, argues that as a matter of federal law the surety company, which is a creditor, has rights to the proceeds of the government contract, superior to those of respondent, and sufficient to require respondent to relinquish the payment made to it. It does not appear that the surety has made any such claim. The surety, whose claim, if it has one, is adverse and superior to that of petitioner and the other creditors, is not a party to this suit. The affidavits submitted on the motion for summary judgment do not frame any such issue, and we are not pointed to any allegation in them that any amount is due and owing from the bankrupt to the surety. Hence the claim, if it exists, is not one which could be adjudicated here.

In any event the affidavits fail to establish the asserted priority of the surety over respondent. The surety did not perfect its assignment by giving the notices and procuring the consent required by the statute. It did not receive the proceeds of the contract here in question. They were paid to respondent which does not appear to have had any notice of the prior assignment of the surety. Under the federal rule, respondent is entitled to retain the assigned money which it received without notice of the prior assignment to the surety. *Judson* v. *Corcoran*, 17 How. 612; cf. *Salem Co.* v. *Manufacturers' Co.*, 264 U. S. 182, 192-193. The *Martin* case does not control here, since the subsequent assignee in that case took with notice of an earlier assignment and as part of an obviously fraudulent scheme. These facts, which were sufficient in that case to require that the subsequent assignee relinquish the transferred funds, are lacking here. Hence it is unnecessary to consider whether, as the Court of Appeals held, the trustee is without standing to assert alleged rights of the surety.

Affirmed.

Mr. Justice BLACK dissents.